INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provision involved	3
Statement	3
Argument	6
Conclusion	15

CITATIONS

Cases:

Campbell v. *United States*, 373 U.S. 487	11
Garcia v. *United States*, 315 F. 2d 133, certiorari denied, 375 U.S. 855	14
Gober v. *City of Birmingham*, 373 U.S. 374	9
Killian v. *United States*, 368 U.S. 231	10, 11
Lawn v. *United States*, 355 U.S. 339	8
Needelman v. *United States*, No. 278, O.T., 1959, certiorari dismissed as improvidently granted, 362 U.S. 600	10
Ogden v. *United States*, 323 F. 2d 818, certiorari denied, 376 U.S. 973	11
Palermo v. *United States*, 360 U.S. 343	10
Peeples v. *United States*, 341 F. 2d 60, certiorari denied, 380 U.S. 988	14
Peterson v. *Greenville*, 373 U.S. 244	9
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	13
Shuttlesworth v. *Birmingham*, 373 U.S. 262	9
United States v. *Greco*, 298 F. 2d 247, certiorari denied, 369 U.S. 820	11

220-900—66——1

Cases—Continued Page

United States v. *Hilbrich*, 341 F. 2d 555, certiorari denied, 381 U.S. 941 11

United States v. *Johnson*, 383 U.S. 169 ..... 4, 6, 7

United States v. *Procter & Gamble*, 356 U.S. 677 13

United States v. *Provenzano*, 334 F. 2d 678, certiorari denied, 379 U.S. 947 9

Constitution, statutes, and rule:

Constitution of the United States, Article I:

Section 5 6

Section 6 ..... 3, 4, 6

18 U.S.C. 281 3

18 U.S.C. 371 3

18 U.S.C. 3500 10

Rule 6(e), Fed. R. Crim. P 13

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1345

J. KENNETH EDLIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1733 Misc.

WILLIAM L. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (XV R. 42–90)[1] is reported at 337 F. 2d 180. The opinion of the dis-

[1] "R." preceded by volume number designates the certified record on file with the Clerk of this Court, consisting of fifteen folders containing, *inter alia*, the trial transcript (Volumes V–XIV) and the proceedings in the court of appeals (Volume XV).

trict court (I R. 309–335) is reported at 215 F. Supp. 300.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1964 (XV R. 92). Timely petitions for rehearing and/or rehearing *en banc* (XV R. 111–140; 142–158) were denied on March 24, 1966 (XV R. 165). On timely application, the Chief Justice extended the time for the filing of a petition for a writ of certiorari in No. 1345 until May 23, 1966, and the petition was filed on that date. The Chief Justice also extended the time for the filing a petition in No. 1733 Misc. until May 23, 1966, without prejudice to the full Court's consideration of whether the application for the extension was filed in time,[2] and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitutional Speech or Debate Clause bars the prosecution of persons who are not members of Congress on a charge of conspiracy if the government's proof includes evidence pertaining to the content and motivation of a legislative speech made by a Congressman.

2. Whether petitioners were properly convicted as aiders and abettors of a Congressman's violation of a conflict-of-interest statute even though the Congress-

[2] The extension of time in No. 1733 Misc. was sought on May 5, 1966, more than 30 days after the denial of rehearing by the court of appeals. The petition is accordingly out of time under Rules 22–2 and 34–2 of the Rules of this Court.

man's conviction was reversed and remanded for a new trial.

3. Whether petitioner Robinson was entitled to the production of grand jury testimony and notes taken by a government witness.

4. Whether evidence of prior misconduct was improperly admitted against petitioner Edlin.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6, of the United States Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

Petitioners were convicted together with former Congressmen Thomas F. Johnson and Frank W. Boykin in the United States District Court for the District of Maryland on one count of conspiracy to defraud the United States of the services of the two Congressmen (18 U.S.C. 371) and seven substantive counts charging that they aided, abetted, counselled and commanded Congressman Johnson to violate the federal conflicts of interest statute (then 18 U.S.C. 281) (I R. 14–44; XIV R. 6335–6348). Petitioner

Edlin was sentenced to a one-year prison term on each count, the sentences to run concurrently, and fined a total of $16,000 (II R. 631). Petitioner Robinson was sentenced to a concurrent six-month term of imprisonment on each count (II R. 632).

Finding the evidence "more than sufficient," the court of appeals affirmed petitioners' convictions on all counts (XV R. 80, 89). The court held that "none of the privileges [of the Speech or Debate Clause, Article 1, Section 6] pertain to the defendants who are not members of Congress" (XV R. 62). At the same time, the court reversed Congressman Johnson's conviction on the conspiracy count on the ground that the Speech or Debate Clause did bar the prosecution of a Congressman for accepting money to make a speech in Congress. It also vacated Johnson's conviction on the substantive counts, remanding for a new trial thereon, on the ground that the impermissible evidence relating to the speech prejudiced his trial on these counts (XV R. 62, 89). This Court affirmed the reversal as to Congressman Johnson without reviewing the ruling on the substantive counts. *United States* v. *Johnson,* 383 U.S. 169.[3]

The pertinent evidence—the sufficiency of which is not in dispute—is set out in the opinion of the court of appeals (XV R. 42–90), and in the government's principal brief in *Johnson* (No. 25, O.T., 1965, pp. 3–7). Insofar as relevant it may be summarized as follows:

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[3] Congressman Boykin, who did not appeal his conviction, was pardoned by the President on December 17, 1965.

In 1960 and 1961 petitioner Edlin was the dominant figure of First Colony and First Continental Savings and Loan institutions and was under indictment for mail fraud in connection with the activities of First Colony. Petitioner Robinson was Edlin's associate and an officer of each of these organizations. In May 1960, petitioners communicated with Congressman Johnson. Robinson thereafter supplied material for a speech which the Congressman delivered on the floor of Congress on June 30, 1960, in behalf of independent savings and loan associations. In the first week of June, Robinson told Edlin's secretary that Congressman Johnson was "on our payroll." On June 20 Robinson sent Johnson, allegedly as a campaign contribution, a check for $500. The funds had been supplied in part by First Continental. Immediately before or immediately after the speech was given, Edlin displayed a copy of its text, commenting that there was no reason to fear the mail fraud indictment since "we have friends on the Hill." Reports of the speech were purchased by First Continental which distributed them to influence potential savers to deposit funds in the Edlin-controlled savings and loan institutions.

Thereafter, through most of 1961, Congressmen Johnson and Boykin made numerous visits to officials of the Department of Justice in an effort to convince the Department to dismiss the indictment pending against Edlin. Johnson received substantial amounts of money from Robinson and First Continental for these services.

ARGUMENT

1. In *United States* v. *Johnson,* 383 U.S. 169, this Court held that the Speech or Debate Clause of the Constitution (Art. 1, Sec. 6) barred prosecution of a Congressman on a charge of conspiracy if proof of the offense involved an inquiry into the content and underlying motives of a speech which the Congressman had delivered on the floor of the House. Petitioners contend that their convictions must also be reversed because unfettered legislative speech is endangered by any prosecution in which the motives of such speech are questioned irrespective of whether the Congressman who delivered the speech is personally named as a defendant.

This argument misconceives the nature and purpose of the constitutional Speech or Debate privilege. The privilege applies, by its terms, only to members of Congress—"*they* shall not be questioned * * *." [Emphasis added.] And it prohibits only inquiries and punishment outside the legislative chamber—"* * * in any *other* Place." [Emphasis added.] The Constitution reserved for Congress the power to punish improper speech of its members in the legislative chamber.[4] Indeed, the court of appeals emphasized that "the Constitution has clothed the House of which [Congressman Johnson] is a member with the sole authority to try him" (337 F. 2d at 190) and that "sanc-

[4] See Article 1, Section 5 of the Constitution providing in pertinent part: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member."

tions remain unimpaired which may be imposed by the House membership" (*id.* at 191).

The authority of Congress to punish its members is an integral aspect of the privilege. It demonstrates that the purpose of the Speech or Debate Clause was to keep legislative speech free from executive or judicial limitation and thereby to maintain the separateness of the three branches of government. This purpose of the Speech or Debate Clause was emphasized by this Court in *Johnson* (383 U.S. at 182):

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, *in the context of the American system of separation of powers, is the predominant thrust of Speech or Debate Clause.*[5] * * * [Emphasis added.]

Nothing said or implied in *Johnson* supports the proposition that the privilege extends to private parties such as petitioners who are not Senators or Representatives. The policy underlying the privilege compels the opposite result. Since private parties are not subject to congressional punishment for their role in causing improper conduct in the legislative chamber, such persons would have absolute immunity if they could not be punished in a judicial proceeding involving inquiry into a speech delivered in Congress.

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[5] And again (*id.* at 178): "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." See also *id.* at 181.

220-900—66——2

In effect, the rule proposed by petitioners would mean that they, unlike Congressmen, would be immune from prosecution and punishment "in any place," not merely "in any *other* Place" (emphasis added).

Nor is there substance to the claim that the prosecution of private parties like petitioners would have a "chilling effect" on legislative debate. The degree of "questioning" involved in the prosecution of a person who is not a Congressman—particularly where, as here, the buying of the speech is part of a larger conspiracy to defraud the United States—is substantially less of an inhibition upon speech than if a Congressman himself may be compelled to defend his motives. It is true that the Speech or Debate Clause safeguards untrammelled legislative debate. But it is meant to serve this end only where the Constitution affords some remedy within the legislative branch. The privilege is, in other words, a personal right belonging only to the Senator or Representative making the speech; the Constitutional draftsmen surely did not intend, we submit, to immunize from all punishment those who were accessories to an improper speech but who are beyond the reach of the legislature's power to "punish its Members."

2. Petitioners' contention that they could not be convicted as Johnson's aiders and abettors on the seven substantive counts because his conviction was reversed is unsound.[6] The court of appeals reversed

[6] With regard to petitioner Robinson, the sentences on the substantive counts were concurrent with the conspiracy sentence. Hence the judgment is supportable on the conspiracy count alone. See *Lawn* v. *United States*, 355 U.S. 339, 359. While petitioner Edlin's prison sentences were also concurrent, he was fined separately on each count.

Johnson's convictions on the substantive counts not because the proof was insufficient to establish his guilt but because proof concerning the speech—which he was personally privileged to have excluded—must have affected the jury's consideration on the substantive counts. Since, as we have shown above, petitioners were not entitled to have evidence pertaining to the speech excluded, their convictions on the substantive counts were clearly untainted by any impermissible proof. Cf. *United States* v. *Provenzano,* 334 F. 2d 678, 691 (C.A. 3), certiorari denied, 379 U.S. 947. The reversal of aider and abettor convictions by this Court in *Shuttlesworth* v. *Birmingham,* 373 U.S. 262, 265–266, is readily distinguishable since that decision rested on the finding that the conduct which defendants were charged with having aided and abetted was "an innocent act" and not a crime at all. See *Gober* v. *City of Birmingham,* 373 U.S. 374; *Peterson* v. *Greenville,* 373 U.S. 244.

3. Petitioner Robinson's contentions concerning the court's refusal to order the production of notes and grand jury testimony are without merit.

a. The government called F.B.I. Agent Strickland as a rebuttal witness. He testified that during his January 1962 interview with petitioner Robinson the latter showed him a check for $1,000 made out to Congressman Johnson, dated August 30, 1960, and advised the agent that the check was in payment for legal fees. Robinson also told the agent that Johnson had received other fees ranging from $6,000 to $7,500

but he did not mention any retainer arrangement (XIII R. 5476–5481).[7]

Agent Strickland further testified that he had taken notes at the interview but that these had been destroyed in accordance with F.B.I. procedure after they had been used to prepare a formal report (XIII R. 5479–5482, 5484–5485).[8] Agent Strickland's report—which he characterized as a "verbatim copy" of what Robinson had told him (XIII R. 5484)—was prepared at the time of the interview and was shown to Robinson, who made some corrections and signed it. This report was made available to the defense (XIII R. 5479–5480).

The district court properly denied the defense motion to strike the agent's testimony (XIII R. 5486–5487). Even if the notes in question were producible "statements" under 18 U.S.C. 3500—which, we submit, they were not[9]—it is clear that their destruction was not improper. This Court's ruling in *Killian* v.

[7] Robinson had testified that Johnson was employed on a retainer basis, receiving a fee of $800 per month between January and April 1961, and a fixed fee of $25,000 thereafter (XI R. 4282–4285).

[8] See the similar testimony of F.B.I. Agent Milne concerning notes of an interview with Congressman Johnson's administrative assistant (XIII R. 5468–5475).

[9] The notes were personal jottings retained by the interviewer and not communicated to the person interviewed or to any government agent. Compare *Palermo* v. *United States*, 360 U.S. 343, and the government's brief in *Needelman* v. *United States*, No. 278, O.T., 1959, pp. 17–31, certiorari dismissed as improvidently granted, 362 U.S. 600.

United States, 368 U.S. 231, 242, is fully applicable here:

> At to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. * * *

See also *United States* v. *Hilbrich,* 341 F. 2d 555, 557 (C.A. 7), certiorari denied, 381 U.S. 941; *Ogden* v. *United States,* 323 F. 2d 818, 820–821 (C.A. 9), certiorari denied, 376 U.S. 973; *United States* v. *Greco,* 298 F. 2d 247, 249–250 (C.A. 2), certiorari denied, 369 U.S. 820.[10]

b. A few days before the trial, Francis Finneran—then a potential government witness, but in fact called as a defense witness at the trial (XIII R. 5019)— appeared, at the government's request, with counsel at

[10] The holding in *Campbell* v. *United States,* 373 U.S. 487, in no way undermines *Killian.* In *Campbell,* unlike the situation here and in *Killian,* the "precise words" in the destroyed notes were read to the interviewee, who "had adopted this presentation" as his own (373 U.S. at 491–492).

the United States Attorney's office for an interview. He had been asked to bring along his employee, Walter Schultise, but the latter could not attend. Because Finneran thought "it would refresh his recollection" (V R. 9), he and his attorney were permitted to examine, for approximately thirty minutes, the volume of grand jury minutes containing his own testimony and that of Schultise (V R. 10). They also had access to and may have examined the testimony of one James L. Dixon, without the government's consent (V R. 8–11, 21).[11] After ascertaining these facts (V R. 8–33), the trial court denied a defense motion that it dismiss the indictment or order pre-trial disclosure of "the entire transcript of the testimony of all witnesses submitted before the Grand Jury by the Government" (V R. 6–7, 12, 17, 22, 61–66). The court did, however, direct the government to furnish defense counsel with the grand jury testimony of Finneran, Schultise and Dixon. The court also stated that if it later developed that Finneran or his counsel had examined the testimony of any other grand jury witness it would "promptly consider broadening its ruling" (V R. 63–64).[12]

The relief granted by the district court was plainly appropriate. There is no basis whatever for peti-

[11] The volume they examined was 182 pages in length and contained the testimony of four other grand jury witnesses (V R. 24–25). None of these witnesses (including Schultise and Dixon) testified at trial.

[12] As the trial court found (V R. 63), there was no evidence to support the claim that the testimony of any other witness had been read by Finneran or his attorney.

tioner Robinson's assertion that government counsel intentionally selected and exhibited favorable portions of the grand jury testimony to reinforce the confidence of his witnesses.[13] Indeed, the witness whose memory and confidence were allegedly affected by an examination of the grand jury minutes was not called to testify for the government; he was a defense witness. Manifestly, the defense failed to carry the burden of showing a "particularized need" to see any additional grand jury testimony. See *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400; *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677, 683. Nor does this case involve a request by the defense to see the grand jury testimony of a government witness for impeachment purposes. Hence the issue presented in *Dennis* v. *United States,* No. 502, this Term, is not involved.

4. Petitioner Edlin's assertion (Pet. No. 1345, pp. 20–23) that government witnesses improperly testified to his past criminal record and earlier brushes with the law is unsound. The conflict-of-interest charges made in the indictment were based on the efforts of Congressmen Boykin and Johnson, at the behest of Edlin and Robinson, to have Department of Justice officials dismiss an indictment pending against Edlin. In the discussions between the Congressmen

[13] While the district court refused to rule specifically whether, by disclosing the minutes to Finneran, the United States Attorney had violated the secrecy requirement of Rule 6(e), Fed. R. Crim. P. (V R. 64), the court did indicate that, in its view, government counsel was not guilty of any impropriety (V R. 13–15, 18–19).

and the Department of Justice personnel, the latter explained their reasons for declining to dismiss the charges, and those representing Edlin offered explanations of his prior acts and suggested how he could aid the Department in other matters. It was in this context that evidence relating to Edlin's past history came into the record. Hence the evidence bore directly on the principal charge that Edlin used the Congressmen to serve his private ends.[14] Moreover, the trial court repeatedly admonished the jury not to consider such testimony as showing a propensity or predisposition to commit the crime for which Edlin was being tried (see, *e.g.*, V R. 40–53; VII R. 1684, 1743–1744, 1819; XIV R. 6263).

Nor was government counsel's closing argument improper. As the court of appeals observed, counsel's statement that Edlin presented no defense, no evidence and no witnesses was an accurate comment on the state of the record. It did not focus impermissibly on petitioner's failure to take the stand. See *Garcia* v. *United States*, 315 F. 2d 133, 137 (C.A. 5), certiorari denied, 375 U.S. 855; *Peeples* v. *United States*, 341 F. 2d 60, 65 (C.A. 5), certiorari denied, 380 U.S. 988.

[14] For example, evidence that defendants brought Charles Meyer, Edlin's former parole officer, from Chicago to Washington, D.C., to confer with Department officials and testimony concerning what he said at their behest about Edlin's past misconduct related directly to proof of overt acts 40–44 under the conspiracy count (see I R. 26–27).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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